

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

SEP 13 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ALBERT BRION URIAS,

Appellant.

2 CA-CR 2006-0241

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054744

Honorable Christopher Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Michael T. O'Toole

Phoenix
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Albert Urias was convicted after a jury trial of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended or revoked and aggravated driving with a blood alcohol concentration of 0.08 or more while his license was suspended or revoked, both class four felonies. After finding he had a prior conviction for aggravated DUI, the court sentenced Urias to concurrent, presumptive prison terms of 4.5 years. On appeal Urias contends the trial court erred when it denied his motion to suppress the results of his blood alcohol test because the arresting officer did not have probable cause to arrest him for DUI. He also argues the trial court erred when it did not dismiss the case based on an alleged violation of Urias's right to counsel. For the reasons stated below, we affirm.

¶2 In reviewing a trial court's ruling on a motion to suppress evidence we consider only what was presented during the suppression hearing. *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). Whether an arrest was justified by probable cause is a mixed question of law and fact. *State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996). We defer to the trial court's factual findings, but review legal questions de novo. *Id.*

¶3 At the suppression and dismissal hearing, Arizona Department of Public Safety Officer Kathleen Montgomery testified she had stopped a vehicle that had sped out of a parking lot, did not have a license plate, and was traveling at a speed of ten miles per hour over the limit on Speedway Boulevard in Tucson. Before stopping the vehicle, Montgomery

noticed it had an invalid temporary plate. She switched on her flashing lights, but the vehicle did not stop for many blocks, and then, only after Montgomery had activated her siren.

¶4 When Montgomery approached the driver, later identified as Urias, his face was flushed, his eyes were bloodshot and watery, and his speech was slurred. She smelled “a moderate to slight odor coming from the vehicle and/or him as he was speaking.” Urias “was pretty much speaking nonstop” and his mood would “go from one extreme to the other.” When Montgomery asked Urias for his license and registration, he handed her an Arizona identification card and the title to the vehicle, admitting that his license was suspended and/or revoked.

¶5 Officer Montgomery asked Urias to get out of the vehicle and then took him back to her patrol car. She asked him if she could look at his eyes to see if he had been drinking. He denied drinking and refused to submit to any sobriety tests without an attorney. Montgomery placed him under arrest and then confirmed that his license was suspended and revoked and that there was an outstanding warrant for his arrest. Montgomery advised Urias of the *Miranda*¹ warnings and, shortly thereafter, Arizona’s implied consent law.² Urias told Montgomery multiple times that he wanted to contact an attorney. She assured him she

¹*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

²A.R.S. § 28-1321.

would provide that opportunity when they reached the station. She also told him to tell the attorney that she would be requesting a blood sample.

¶6 At the station, Montgomery gave Urias a telephone book and seated him at a table in a holding room with a telephone. He located an attorney to call and asked that Montgomery dial the number for him. She placed the call for him and handed the receiver back to him. When he reached an answering machine, he placed the receiver down and said he wanted to call another attorney. Montgomery returned the telephone book to him and dialed another number for him. He reached an answering service and chose to leave a message with call-back information Montgomery provided to him.

¶7 Officer Montgomery answered the telephone when attorney Paul Banales returned Urias's call. Montgomery took Urias out of a holding cell, seated him at the table in the holding room, and handed him the telephone. She and three other officers then left Urias alone in the room. However, the officers stood outside the open door in the hallway, approximately twenty to twenty-three feet from Urias. Urias spoke to Banales for fourteen to fifteen minutes. Montgomery could hear Urias's voice, but could not tell what he was saying. Montgomery only entered the room during Urias's conversation with Banales when Urias requested a pen and paper. When Banales sought to speak directly with Montgomery, Montgomery refused. Banales later testified that he sought to determine from the officer whether Urias could be overheard by the officers.

¶8 Urias was charged with the instant offenses. He moved to suppress “statements, breath test results, and other evidence” obtained after Urias’s arrest, contending the arrest was not supported by probable cause. Urias also moved to dismiss the charges against him on the ground that the state had violated his right to consult “freely and openly with his attorney” by telephone on the night of his arrest. The trial court denied both motions, finding Montgomery had had probable cause to arrest Urias and that the state had not violated Urias’s right to counsel.

¶9 Urias first contends the state did not present evidence at the suppression hearing demonstrating that Montgomery had probable cause to believe he had been driving while under the influence of intoxicating liquor or impaired to the slightest degree. *See* A.R.S. § 28-1381(A)(1) (unlawful to drive “[w]hile under the influence of intoxicating liquor . . . if the person is impaired to the slightest degree”). Consequently, he maintains that the blood alcohol test results should have been suppressed because the officers lacked probable cause to require such a test, *see* A.R.S. § 28-1321(A) (requiring valid arrest before defendant required to undergo test) and because the results were the fruits of an illegal arrest. *See Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 416 (1963). We disagree.

¶10 Probable cause to arrest without a warrant exists if the arresting officer has “reasonable grounds to believe that an offense is being or has been committed by the person arrested.” *State v. Torrez*, 112 Ariz. 525, 527, 544 P.2d 207, 209 (1975). Whether

sufficient information exists depends on the “totality of the facts and circumstances known to police officers at the time of the arrest.” *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985) (citation omitted). When arresting a suspect for DUI, “[t]he arresting officer is entitled to draw specific reasonable inferences from the facts in light of [her] own experience.” *State v. Superior Court*, 149 Ariz. 269, 275, 718 P.2d 171, 177 (1986).

¶11 Officer Montgomery testified that she possessed extensive training and experience in conducting DUI investigations. On the night in question, she observed Urias traveling at a high rate of speed out of a parking lot. He continued to speed once on Speedway Boulevard and did not promptly pull over when Montgomery turned on her flashing lights. Urias’s face was flushed, his eyes were bloodshot and watery, and his speech was slurred. She smelled “a moderate to slight odor coming from the vehicle and/or him as he was speaking.”³ Urias was constantly talking and interrupting Montgomery and experiencing “[m]ood swings.” In short, Urias displayed poor driving, a slow reaction to the officer’s emergency lights, his slurred speech demonstrated impaired motor control, and his physical presentation and unstable mood were consistent with intoxication by alcohol. Assuming *arguendo* that no single one of these facts in isolation would constitute probable cause to arrest Urias for DUI, they provide ample cause for that arrest when considered in their totality. The trial court, therefore, did not err in so concluding.

³Although Montgomery did not specifically testify that the odor she smelled was alcohol, in context the court could have readily so inferred.

¶12 Urias also maintains the trial court committed reversible error when it declined to dismiss the case based on a violation of his right to counsel. Specifically, he contends the officers did not provide him with the necessary privacy to speak freely with his attorney. The trial court concluded: “Officer Montgomery did not intentionally or inadvertently undertake to monitor the Defendant’s conversation with Mr. Banales,” and thus, Urias’s right to counsel was not violated. We review the trial court’s decision for an abuse of discretion. *State v. Superior Court*, 128 Ariz. 583, 585, 627 P.2d 1081, 1083 (1981) (motions *in limine* in criminal cases treated as motions to suppress).

¶13 In Arizona, a person in custody has “the right to consult in private with [the] attorney . . . as soon as feasible after a defendant is taken into custody.” Ariz. R. Crim. P. 6.1(a); *see also State v. Sanders*, 194 Ariz. 156, ¶ 6, 978 P.2d 133, 134 (App. 1998). A person accused of DUI has the right to speak to an attorney before taking a test to determine blood alcohol concentration. *State v. Transon*, 186 Ariz. 482, 484, 924 P.2d 486, 488 (App. 1996). “The state may not . . . without justification, prevent access between a defendant and his lawyer . . . when such access would not unduly delay the D[U]I investigation and arrest.” *State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985). Once a defendant begins talking to an attorney, he “must be allowed to do so in a meaningful way” so as to fulfill his right to confidentiality. *Id.* at 456, 711 P.2d at 595. If “the right to counsel is violated, then the conviction obtained as a direct result must be set aside.” *Id.*

¶14 The record does not support Urias's contention that the officers obstructed his right to a private discussion with an attorney. At the outset, Officer Montgomery made every effort to facilitate Urias's efforts to contact counsel. After Urias stated he wished to speak to an attorney, Officer Montgomery promptly assured him that she would give him that opportunity. Once at the station, she provided him with a telephone book and a telephone. At his request, she helped him dial the numbers. And, she allowed him the necessary time to attempt two different numbers and await a return call from an answering service. She also gave him the relevant call-back information.

¶15 Nonetheless, Urias contends Montgomery failed to provide him with sufficient privacy to secure meaningful, confidential legal advice. He asserts that, although Montgomery provided him with a separate room to receive attorney Banales's call, the door remained open. He maintains the officers remained within ten feet of him outside of the door and that they were listening to his conversation—a fact that could be demonstrated by Montgomery's immediate response to his request for a pencil. Banales testified he could hear the officers' voices in the background and therefore felt uneasy about continuing the discussion with Urias in the absence of assurances from an officer that Urias's statements would remain private. According to Banales, he asked to speak to Montgomery but she declined. *See Municipal Court of City of Phoenix v. Waldron*, 157 Ariz. 90, 93, 754 P.2d 1365, 1368 (App. 1988) (suggesting attorney should attempt to speak with officer if attorney

harbors concerns about privacy). As a result, Banales testified he did not feel he could effectively explore and discuss with Urias his legal options.

¶16 But the trial court reasonably could have concluded, as it apparently did, that Montgomery had provided Urias with a separate room precisely so that Urias would have some privacy for his discussion with counsel. And, Montgomery testified that no officer was closer than twenty to twenty-three feet from Urias and that she had not listened to Urias's conversation, nor had she been aware of any other officer listening. Rather, she testified, the officers were having a separate conversation among themselves, a point corroborated by Banales's testimony that he could hear their voices. Furthermore, Urias himself never asked the officers to provide him with additional privacy. *See Waldron*, 157 Ariz. at 92-93, 754 P.2d at 1367-68 (failure of defendant to seek more privacy a factor in concluding officers did not impair right to counsel). Finally, the trial court reasonably could have found that the officers had left the door to the holding room open not to eavesdrop but rather so they could maintain visual contact with Urias—a procedure necessary for the “orderly and efficient jail operations and the maintenance of security.” *State v. Holland*, 147 Ariz. 463, 464, 711 P.2d 602, 603 (App. 1985), *quoting* Arizona Proposed Rules of Criminal Procedure 6.1(a) cmt., State Bar Committee on Criminal Law (July 15, 1972).

¶17 The trial court was entitled to credit Montgomery's version of the events to the extent they conflicted with Urias's. *See State v. Uriarte*, 194 Ariz. 275, ¶44, 981 P.2d 575, 583-84 (App. 1998). The record, taken in the light most favorable to sustaining the trial

court's ruling, *see State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), does not demonstrate that Urias's conversation had been obstructed by any objective lack of privacy. And because the primary cause of any reduced privacy—the open door—was necessary to maintain security in the context of Urias's arrest, the trial court did not err in concluding that, under the totality of the circumstances, the state did not violate Urias's right to counsel.

¶18 Affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge